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No. 86-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SEATTLE TOTEMS HOCKEY CLUB, INC., *et al.*,
Petitioners,

v.

NATIONAL HOCKEY LEAGUE, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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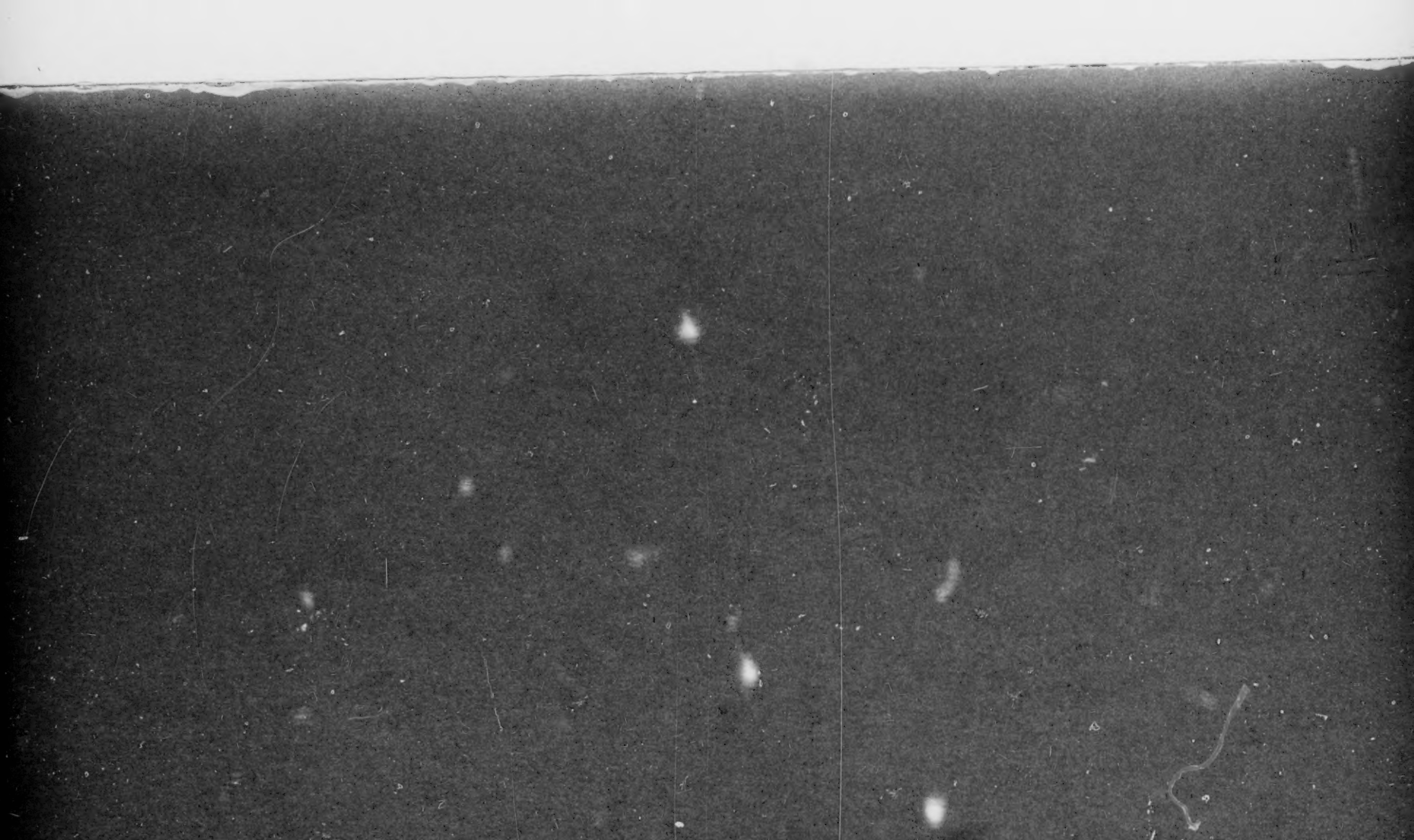
BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:

GILBERT STEIN
The National Hockey League
500 Fifth Avenue
New York, New York 10110
(212) 398-1100

HERBERT DYM*
BINGHAM B. LEVERICH
JOANNE B. GROSSMAN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5520
Attorneys for Respondents

**Counsel of Record*



QUESTION PRESENTED

The only question petitioners seek to present—whether the Seattle Totems had standing to maintain their antitrust claims against the National Hockey League—is not presented in this case for consideration by this Court. The courts below did *not* dismiss petitioners' claims on the basis of rulings as to the Totems' standing. On the contrary, as stated by the court of appeals:

> "The trial court found that the Totems had standing to allege an antitrust injury arising from allegedly anticompetitive conduct of the NHL directed toward the WHA. Because we affirm the district court's dismissal on evidentiary grounds, we do not address the NHL's contention that the Totems lacked standing." (Pet. App. A6, n.4)

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondents in Opposition

Respondents respectfully request that this Court deny the petition for writ of certiorari.[1]

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[1] Respondents are the National Hockey League and various member clubs of the League at the time the Complaint was filed, as identified in the Petition, at page ii. The listing of respondents there is correct except that California Sports, Inc., is an additional respondent, and Frank A. Griffiths and William J. Hughes are not respondents, having been dismissed from the action by the district court (Tr. 4644) in a ruling from which no appeal was taken.

In accordance with Rule 28.1, respondents state that each of the following is a parent, partially-owned subsidiary, or affiliate company of a corporate respondent: Western Broadcasting, Ltd.;

STATEMENT OF THE CASE

This is an antitrust action for damages brought by petitioners in 1975 complaining of their failure to obtain a franchise from respondent National Hockey League ("NHL") for operation of a major league hockey team in Seattle. Petitioners also advanced theories that the NHL was responsible for their not having obtained hockey franchises in other existing or contemplated major leagues.

Following extensive discovery, the case was tried to a jury in 1983. Respondents moved for a directed verdict or for dismissal at the close of petitioners' case. The district court granted the motion and dismissed the case on the grounds that petitioners had failed to prove any adverse effect on competition resulting from their not having obtained an NHL franchise and that there were also failures of proof in connection with their other theories. (Pet. App. B1-B5) The Ninth Circuit affirmed on the same grounds in a unanimous opinion. (Pet. App. A1-A8)

Relevant Background Facts

Petitioner Seattle Totems Hockey Club, Inc. ("the Totems"), was a club in a minor professional hockey league, the Western Hockey League ("WHL"). The other petitioners, Abbey and Barnes, were individual shareholders of the Totems.[2]

JML Inc.; Consolidated Enterprises Inc.; Harold E. Ballard Ltd.; and The Aud Club, Inc.

[2] The relationship between the NHL, as a major league, and the WHL and other minor professional hockey leagues was governed by the Joint Affiliation Agreement ("JAA"). (Ex. 336) Under the JAA, the owners of WHL clubs were assured of a source of hockey players—from clubs in the NHL—at reasonable

The World Hockey Association ("WHA") was formed as a major professional hockey league in 1971. It competed with the NHL for players, fans, and revenues until 1979, when it disbanded (Tr. 958, 1283-84).

The emergence of the WHA as a second major hockey league made continuation of the WHL as a minor league no longer a viable option. The WHL owners concluded in the fall of 1971 that, in order to survive, the WHL would have to achieve "major league status," and they articulated various possible ways of doing so: (1) attempting to gain entry into the NHL; (2) joining forces with the WHA; and (3) forming a separate major league of their own. (Exs. 455, 444)

The WHL owners rejected altogether the alternative of forming their own major league, and they took no steps to pursue it (Tr. 880-81). After preliminary exploration of the possibility of joining forces with the WHA, the WHL owners rejected this alternative as well (Tr. 887-88, 897-98).

The WHL owners unanimously believed that the best way to achieve major league status was to persuade the NHL to admit the WHL clubs, and they so advised the NHL. (Ex. 444) Lengthy negotiations ensued, culminating in the "White Paper," which was

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cost. Although the WHL had the right under the JAA to terminate the agreement upon proper notice to the other parties, it never did so. Had the WHL clubs terminated the JAA, they no longer would have been subject to the provisions of the Pro-Am Agreement and the NHL's Constitution and By-Laws. The WHL clubs did not terminate the JAA because they lacked both the financial resources and the desire to compete with the NHL for players (Tr. 721-26).

signed on June 7, 1972. (Ex. 529) This agreement provided that if the NHL should expand again after the 1974-75 season, it would offer to WHL members at least one-half of any expansion franchises until the NHL had franchises in four WHL cities. The White Paper did not prohibit WHL clubs from joining the WHA. Two WHL clubs did join the WHA, Phoenix in 1973 and Denver in 1974 (Tr. 733-34).

The WHA brought an antitrust action against the NHL in 1972,[3] and the case was settled by entry of a consent decree in February 1974. (Ex. 630) The consent decree did not end competition between the NHL and WHA; the competition continued unabated until 1979, when the WHA disbanded and the owners of four of its franchises thereafter acquired NHL franchises (Tr. 958).

In June 1974, the NHL voted to award a conditional franchise for Seattle, as represented by petitioner Abbey, to commence play in the 1976-77 season.[4] (Ex. 682) The principal conditions included making payments totalling $6 million to the NHL and obtaining a long-term arena lease. These conditions, which were no different than the conditions upon which prior NHL franchises had been awarded, were not met, and the conditional franchise for Seattle therefore expired in mid-1975. (Exs. 833, 834, 882)

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[3] *See Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

[4] Denver was awarded a conditional franchise in the NHL at the same time as Seattle. (Ex. 682) With the prospect of these two WHL clubs joining the NHL, in June 1974 the parties abrogated the White Paper and executed releases of all claims growing out of the agreement. (Ex. 690)

The NHL did not award either a conditional franchise or a final franchise for Seattle to anyone else.

Proceedings Below

Petitioners filed their Complaint in November 1975, and a jury trial began in November 1983.[5] After petitioners had rested, respondents moved to dismiss or for a directed verdict, and the court granted the motion. Citing *Mid-South Grizzlies* v. *National Football League*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984), and other decisions,[6] the district court found that:

> "any denial of an NHL franchise to plaintiffs, assuming that there was a denial, was pro-competitive, rather than anti-competitive, in its effect and hence was not violative of the antitrust laws.
>
> . . . .
>
> ". . . That denial, if there was one, left Seattle with a fine ice hockey arena and a large metropolitan population wide-open as the potential site for a WHA franchise and the WHA, in consequence, as a strengthened, rather than weakened competitor of the NHL." (Pet. App. B2)

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[5] One of the respondents, Northwest Sports Enterprises, Ltd. ("Northwest"), filed a counterclaim against petitioners Abbey and Barnes for amounts owing under two contracts. The district court ordered bifurcated trials on the counterclaim and antitrust claims. The counterclaim trial resulted in a judgment for Northwest of $291,821. (Pet. App. C)

[6] *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974); *Levin* v. *National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974).

The district court went on to rule, on the basis of *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), that the Totems had standing to complain of alleged anticompetitive activities by the NHL directed toward the WHA which allegedly induced petitioners not to seek a franchise in the WHA. (Pet. App. B3-B4) The claim was dismissed, however, on the basis of the court's finding that "[t]here is no evidence at all in the record as to the value of a WHA franchise in Seattle . . . ." (Pet. App. B4)

The district court then turned to petitioners' third theory—"that the actions of defendants denied the Seattle Totems the opportunity to combine with other WHL clubs to form a major hockey league." (Pet. App. B5) That theory also was not viable, the district court held, because "[t]here is no evidence in the record to sustain an affirmative finding" that the WHL clubs intended or were prepared to form a major hockey league and "there is no evidence at all in the record" of the value of a Seattle franchise in such a league. (Pet. App. B5)

On appeal, the Ninth Circuit affirmed unanimously. It, too, followed the Third Circuit's decision in *Mid-South Grizzlies* and held:

> "The Totems were not competing with the NHL; they were seeking to join it. They were granted a conditional NHL franchise but failed to fulfill the conditions precedent to obtaining a final franchise. The WHA was competing as a major professional hockey league at that time. Without an NHL franchise Seattle constituted a potential WHA site, and the denial, if any, of an NHL franchise under

> these circumstances did not injure competition. . . . There is no contention or showing that the denial was to protect any other major league team in the Seattle market; there was none. . . .
>
> ". . . The Totems' allegations of wrongful conduct by the NHL do not establish that competition in the relevant market was injured by those acts. Consequently, the Totems have failed to meet their burden of proof on this issue." (Pet. App. A5-A6)

The court of appeals also determined that it need not address the issue of the Totems' standing to complain of the NHL's allegedly anticompetitive conduct directed at the WHA. (Pet. App. A6, n.4) It affirmed the district court's dismissal of the claim on the ground that "there was not sufficient evidence from which a jury could have determined damages. . . ." (Pet. App. A7)

Finally, the Ninth Circuit affirmed the dismissal of petitioners' claim regarding the formation of a new major hockey league. The court of appeals determined that "[t]he record . . . supports the district judge's ruling," noting that "[t]he WHL teams opted not to join the WHA or to form an independent major hockey league." (Pet. App. A8)

The court of appeals denied petitioners' petition for rehearing. The court has stayed its mandate pending this Court's disposition of the petition for certiorari.[7]

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[7] The stay has the effect of delaying recovery by respondent Northwest on the monetary judgment granted it by the district court (Pet. App. C) and on the additional amount to be awarded

REASONS WHY THE WRIT SHOULD BE DENIED

There is no issue in this case that warrants this Court's attention. The only issue tendered by petitioners was not reached by the court of appeals, which affirmed dismissal of petitioners' antitrust claims because of failures of proof. These evidentiary rulings are not of any general importance, and review by this Court will not provide any guidance to lower courts.

1. The only question petitioners seek to present is whether the Totems have standing to maintain their claims against the NHL under *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982). They contend that the Ninth Circuit's decision in this case "is in direct conflict" with *Blue Shield* and *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) (Pet., pp. 15-16), and urge this Court to grant certiorari "to address the substantial question of antitrust standing . . . ." (Pet., p. 23) Petitioners assert that the Ninth Circuit affirmed the dismissal of their Complaint for "lack of standing. . . ." (Pet., p. 2)

There simply is no basis for this reading of the Ninth Circuit's opinion. There is no discussion of the Totems' standing in the opinion; there is not even any reference in the opinion to *Blue Shield*, *Associated General Contractors* or any other antitrust standing case of this Court or of any other court; and the

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by reason of the Ninth Circuit's opinion (*see* Pet. App. A13-A18), on Northwest's counterclaim against petitioners Abbey and Barnes. Petitioners do not seek review by this Court of the Ninth Circuit's rulings regarding the counterclaim.

opinion explicitly states that the court is not addressing the issue of the Totems' standing:

> "The trial court found that the Totems had standing to allege an antitrust injury arising from allegedly anticompetitive conduct of the NHL directed toward the WHA. Because we affirm the district court's dismissal on evidentiary grounds, we do not address the NHL's contention that the Totems lacked standing." (Pet. App. A6, n.4)

It is apparent that the claimed conflict with *Blue Shield* is nonexistent. The court of appeals found it unnecessary to address the issue of petitioners' standing, and did not address it, in affirming the dismissal of petitioners' case. It is frivolous to suggest that this Court should hear this case in order to resolve an issue that the court of appeals found it unnecessary to decide and that would not alter the result below if it were decided in petitioners' favor.[8]

2. The court of appeals' rulings were on evidentiary grounds—a failure of proof as to any adverse effect on competition by reason of any denial by the NHL of a franchise to petitioners,[9] a failure of proof as to

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[8] The district court decided the issue of standing in petitioners' favor, but, nevertheless, dismissed the case. (*See* Pet. App. B3-B4.) Although respondents continue to believe that this ruling on standing is incorrect, the issue is moot at this stage of the case.

[9] It should be noted that even this issue was unnecessary to the court of appeals' decision in light of the court's conclusion that petitioners did not obtain a franchise from the NHL because they failed to fulfill the conditions for the award of a franchise. (Pet. App. A3, A5) There was thus no denial of a franchise by

the value of a WHA or WHL franchise in Seattle, and a failure of proof as to the intention and preparedness of petitioners and others to form a new major hockey league.

These rulings were made initially by the district judge who presided at the trial and heard petitioners' case as it was presented. They were affirmed unanimously by the Ninth Circuit. Additional review of the inadequacies of petitioners' proof would not serve any useful purpose.

CONCLUSION

This action has been pending since 1975. Petitioners had ample opportunity to develop the facts necessary for their case and to put on their proof. Essential elements of their case were lacking, as determined by the district court and the court of appeals. The sole issue on which petitioners seek review was not decided adversely to them by either court below. It is time for this case to end.

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the NHL.

In any event, the determination of lack of proof of any anticompetitive effect is in accord with the Third Circuit's finding in *Mid-South Grizzlies* that the National Football League's refusal to grant a franchise for an area in which no other NFL team was located did not adversely affect competition and thus did not violate the antitrust laws. It is, of course, plain that an "impact on competitive conditions" is an essential element of an antitrust case. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 690 (1978).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT DYM*
BINGHAM B. LEVERICH
JOANNE B. GROSSMAN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5520

Attorneys for Respondents

Of Counsel:

GILBERT STEIN
The National Hockey
League
500 Fifth Avenue
New York, New York 10110
(212) 398-1100

**Counsel of Record*

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